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HAROLD B. WILLEY,

In the

Supreme Court of the United States

OCTOBER TERM, 1953

No. 361

THE GUIBERSON CORPORATION,
Petitioner,

v.

GARRETT OIL TOOLS, INC.,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

S. AUSTIN WIER,
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Dallas, Texas,
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WARLICK LAW PRINTING CO. - LAW BRIEF PRINTING - DALLAS - HARWOOD 9350

In the

Supreme Court of the United States

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THE GUIBERSON CORPORATION,

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GARRETT OIL TOOLS, INC.,

Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your Petitioner, the Guiberson Corporation, respectfully prays for a rehearing on its original petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, which was denied on November 16, 1953, in the above indicated cause; and in support thereof would respectfully show the Court as follows.

Petitioner believes that the validity of the patent in suit, No. 2,519,242, is extremely doubtful, and that upon a full review by the Court the invalidity of the patent could be clearly demonstrated.

The patent is invalid for three reasons:

(1) Anticipation by prior issued patents,

(2) Lack of invention over the prior art, and

(3) Indefiniteness of the claims.

These reasons were more fully set out in Petitioner's Brief attached to the Petition for Writ of Certiorari, heretofore filed.

Petitioner believed, and still believes, that its Petition for Writ of Certiorari was soundly based and that the writ should be granted to determine whether the lower Courts applied the correct criteria of invention to the Garrett, et al., patent, No. 2,519,242, which is admittedly a combination made up of an assembly of old elements, as was done in *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 1950, 71 Sup. Ct. 127, 340 U. S. 147.*

However, in view of the long established practice by the Supreme Court "that certiorari will not usually be granted in patent cases unless there is a conflict in the decisions of Circuit Courts of Appeals" *(Triplett v. Lowell, 1936, 56 Sup. Ct. 645, 648; 297 U. S. 638, 644; General Talking Pictures Corp. v. Western Electric Co., 1938, 304 U. S. 175, 178, 58 Sup. Ct. 849, 851,* and cases cited therein), Petitioner believes that the Petition may have been denied in the

instant cause for the reason that there is no conflict of decisions between Courts of Appeals regarding the validity of the patent here involved.

If such was the reason for denying the Petition, then Petitioner would respectfully show the Court that the facts hereinafter set forth bring this case clearly within the exception stated in *Schriber-Schroth Co. v. Cleveland Trust Co., 1938, 305 U. S. 47, 50, 59 Sup. Ct. 8, 10,* wherein Petition for Certiorari was granted "on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the Sixth Circuit."

The patent in suit is concerned with a gas lift flow valve used in the production of oil from oil wells.

The manufacturers of gas lift flow valves are all located in the State of Texas, in the Fifth Circuit, so that it is highly improbable that litigation involving the validity of said patent would occur in any other circuit.

The Composite Catalog of Oil Field and Pipe Line Equipment, published by the Gulf Publishing Company of Houston, Texas (publishers of the nationally circulated trade magazine "World Oil"), is a compilation and assembly of the catalog sheets of the established manufacturers of oil field tools and equipment of the United States. It shows that the manufacture of gas lift flow valves has been concentrated within the State of Texas ever since the inception of such industry, and that for more than five years

past such concentration has amounted to 100% of the industry. Therefore, all of such industry is located within the Fifth Circuit.

Copies of the said Composite Catalog are on deposit in the Library of Congress. Such catalogs for the year 1936 and for subsequent years bear copyright notices.

All of the Composite Catalogs referred to have been carefully examined by Thomas B. Losey, the Chief Engineer of the Defendant corporation (Petitioner herein), and pertinent facts reflected by such examination are set out in his affidavit attached hereto and made a part hereof.

These Composite Catalogs show that during the past five years there have been only nine manufacturers of gas lift flow valves in the United States, and that all of them are located in Texas. The names and places of business of such manufacturers are set out in the accompanying affidavit.

Respondent corporation (Plaintiff below) makes and sells considerably more than one-half of all gas lift flow valves made and sold in the United States.

During the pendency of this cause in the Trial Court the ratio of valves made and sold by Respondent-Plaintiff to those made and sold by Petitioner-Defendant appears to be of the order of 14 to 1. Respondent-Plaintiff dominates the gas lift flow valve industry of the United States. Such corporation seeks to monopolize the gas lift flow valve industry, and seeks to enforce such monopoly through the use and instrument of an obviously invalid patent, the patent in controversy.

Just one look at the drawings of the prior art patent to Winkler, No. 2,469,038 (Pl. Ex. 50, R. Vol. III, p. 1069), shows every part and parcel of the valve made by Defendant herein, and likewise shows every part and parcel of the valve disclosed in Plaintiff's patent in controversy. Every such part and parcel of all three of these valves is operable in the same manner to produce the same results. It is as clear as a fire bell in the night that there is nothing new in the patent in controversy here.

An obvious question propounds itself: What was the invention made by the patentees of the patent in suit? The answer is inescapable. It is this: *Nothing.*

Another question presents itself, projected by the undeniable facts of this case. That question is this:

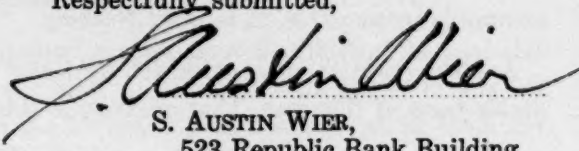
Where the facts show that the corporate Plaintiff below dominates the gas lift flow valve business of this Nation and seeks to create a monopoly of such business by asserting against its competitors a patent in which there is no novelty and no invention, when looked at in the light of the prior art (overlooked by the Patent Office), which patent is, therefore, plainly invalid, and where (as is the case here) all of such business is concentrated in one circuit (the Fifth Circuit), rendering virtually impossible a conflict of decisions between the courts of two circuits, and where the Court of Appeals for the Fifth Circuit has failed and refused to apply against the patent in controversy the criteria and standards laid down by the Supreme Court, what is more fitting, proper and appropriate than that your Petitioner, with all respect, again approach the Supreme

Court, under the aegis of the pronouncement of the Court in the *Schriber-Schroth* case (supra), and ask review of the Court's denial of its most gracious Writ of Certiorari in this cause?

"Is there no balm in Gilead? Is there no physician there?"

WHEREFORE, your Petitioner, The Guiberson Corporation, prays this Honorable Court to grant this Petition for Rehearing, and that the Court's most gracious Writ of Certiorari be granted in this cause.

Respectfully submitted,



S. AUSTIN WIER,
523 Republic Bank Building,
Dallas, Texas,
Attorney for Petitioner.

Dated: November 27, 1953.

CERTIFICATE OF COUNSEL

STATE OF TEXAS }
COUNTY OF DALLAS }

S. Austin Wier, being first duly sworn, on oath certifies and says: That he is attorney of record for Petitioner in the above cause; that in his judgment the within and foregoing Petition for Rehearing is well founded and is not interposed for delay, but in order that justice may be done.

S. Austin Wier

Subscribed and sworn to before me at Dallas, Texas, this 27 day of November, A. D., 1953.

Anne C. White

Notary Public, in and for the County and State aforesaid.

CERTIFICATE OF SERVICE

Two copies of the foregoing Petition for Rehearing have been served on Respondent's Counsel by first class mail, postage prepaid, addressed to Browning and Simms at 3303 Montrose Boulevard, Houston 6, Texas, on this 27 day of November, 1953.

S. Austin Wier

Counsel for Petitioner.

AFFIDAVIT OF THOMAS B. LOSEY

STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, a Notary Public in and for the State and County aforesaid, on this day personally appeared THOMAS B. LOSEY, who, being by me duly sworn, did on oath depose and say, as follows:

My name is Thomas B. Losey. I am Chief Engineer of The Guiberson Corporation, of Dallas, Texas, the Defendant-Petitioner in the hereinabove indicated proceedings. I became an engineer for such firm in 1942 and have been continuously so engaged since that time. I received my degree in Mechanical Engineering from the University of Oklahoma in 1933, and thereafter I continuously practiced mechanical engineering and petroleum engineering in the oil industry of the Southwest.

Since the inception of the use of gas lift flow valves, I have been intimately acquainted with the practice. The first Composite Catalog of Oil Field and Pipeline Equipment offering any such valves to the trade appeared in 1936.

I have personally examined and I am fully acquainted with all of the gas lift flow valves which have been listed in the Composite Catalogs from 1936 to 1953.

During the years 1950, 1951, 1952 and 1953, the Composite Catalogs reflected only nine manufacturers of such

valves; and all such manufacturers were, and still are, located in the State of Texas. They are:

1. Camco, Inc., Houston, Texas.
2. Garrett Oil Tools, Inc., Houston, Texas, and Longview, Texas.
3. The Guiberson Corporation, Dallas, Texas.
4. Macco Oil Tool Co., Houston, Texas.
5. Texas Iron Works, Inc., Houston, Texas.
6. Wilson Supply Co., Houston, Texas.
7. McEvoy Company, Houston, Texas.
8. Merla Tool Corporation, Dallas, Texas.
9. Pioneer Gas Lift Company, Houston, Texas.

A careful study of all Composite Catalogs from 1929 to 1953 shows that no manufacturer of gas lift flow valves, presented to the trade during that time, has ever been located outside of the State of Texas, except in the following instances:

(1) The Proctor-Miller Co., of Alhambra, California, offered a flow valve adaptation during the years 1938 and 1939 only, since which time such concern has not appeared in the Composite Catalog and, to the best of my knowledge, has manufactured no flow valves.

(2) Price-Trawick, Inc., of Stroud, Oklahoma, offered a flow valve from 1936 to 1941, when the concern disappeared from the Composite Catalog and,

to the best of my knowledge, has made no flow valves since about the last named date.

Based on my long experience, and after careful and extensive investigations and examinations, it is my considered opinion that 100% of all the flow valves manufactured in the United States during the last five years have been manufactured within the State of Texas; and that approximately 98% of all gas lift flow valves so manufactured have been put into use in the Gulf Coastal areas of the States of Texas and Louisiana.

It is my further considered opinion, based on investigations and reports of production, that Garrett Oil Tools, Inc., the Plaintiff-Respondent (and the corporation which merged with it, Olsco Mfg. Co.) has made and sold considerably more than one-half of all gas lift flow valves manufactured within the last five years.

I have no knowledge of any gas lift flow valve manufacturing concern located anywhere other than in the State of Texas, now or at any time within the last five years.

Thomas B Losey

(THOMAS B. LOSEY, *Affiant.*)

SWORN AND SUBSCRIBED to before me, a Notary Public in and for the County of Dallas, State of Texas, this 27 day of November, A. D. 1953.

Anne C. White

Notary Public in and for the County and State aforesaid.

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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 361

THE GUIBERSON CORPORATION, *Petitioner*,

v.

GARRETT OIL TOOLS, INC., *Respondent*

Response to Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 361

THE GUIBERSON CORPORATION, *Petitioner*,

v.

GARRETT OIL TOOLS, INC., *Respondent*

Response to Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

This response is limited in its scope to the question most recently raised by Petitioner in seeking rehearing of the Court's denial on November 16, 1953 of its original petition in the above-styled cause. This single question relates to the applicability of the doctrine announced in SCHRIBER-SCHROTH CO. v. CLEVELAND TRUST CO., 1938, 305 U.S. 47, 50; 83 L. Ed. 34.

The one controlling fact is that by whatever doctrine or ruse certiorari might be sought, still the review sought by this Court is only a third review of the evidence to test the soundness of the Trial Court's findings of fact as fully concurred in by the Court of Appeals. This still is a function which this Court is loath to perform, and still only a private controversy of no general importance is involved. GENERAL

TALKING PICTURES CORP. v. WESTERN ELECTRIC COMPANY, INC., 304 U.S. 175; 82 L. Ed. 1273, 1275; FAULKNER v. GIBBS, 338 U.S. 267, 94 L. Ed. 62. This is fully treated in Respondent's brief heretofore filed.

Reference to the Schriber-Schroth decision shows that on its face it is not applicable, in any event, to the instant case for the following two reasons:

1. The patent there considered was of doubtful patentability on a question of law as to the effect of amendments made during the prosecution of the application for patent and as to which question of law the Trial Court and Court of Appeals arrived at different conclusions.

2. The industry of supplying gas lift equipment and other oil tools is as diversified as the production of oil itself which, the Court will take judicial notice, is not centered in the states of the 5th Circuit, whereas the automotive industry and the supply of pistons for use in automobile engines was centered within the particular circuit.

Taking up first question 1, the decision of the Court of Appeals clearly states the evidentiary character of the questions presented in the instant case wherein it states:

> " * * * It will serve no useful purpose to discuss the authorities each cites. There is no real difference of opinion between the parties as to the controlling legal principles. The dispute arises on their application to the facts. The decision of the case, in short, turns on the facts as testified to and found. We cannot agree that the findings are clearly erroneous. On the contrary we think that they are almost, if not quite, demanded by the evidence." (R. 1166-1168)

This clearly distinguishes this case from that of Schriber-Schroth where the purely legal question of the effect of certain amendments in the prosecution of an application for patent was reviewed by this Court. Every decision following the SCHRIBER-SCHROTH case has involved legal issues. Also, the two Courts below in the instant case were in full agreement, as contrasted to the reversal of the Trial Court by the Court of Appeals in the SCHRIBER-SCHROTH case.

As to the second question, the allegations of counsel that the gas lift industry is centered in Texas, supported only by the desperation affidavit of Losey, is contrary to the record testimony and the findings of fact. The uncontested testimony of Garrett is that Respondent's gas lift valve has been used in every principal oil field of the United States as well as several foreign countries (R. 591, Vol. II). The Trial Court so found (Finding 20, R. 85, Vol. I) and this is Petitioner's first contention to the contrary. The 1947 advertisement of Respondent names a sales office in Oklahoma City, Oklahoma, which is within the 10th Circuit (Def.'s Exs. 103-A and 103-B, R. 1109, 1110, in evidence R. 626, Vol. II). The universal distribution of oil fields and of gas lift equipment therefore is further illustrated by Defendant's Exhibit 101, Respondent's 1951 catalog, which names new offices in Los Angeles, California, and Hobbs, New Mexico, in addition to the one in Oklahoma City, Oklahoma (Physical exhibit sent up with record and referred to at R. 489 and 490, and R. 816, 817). These locations, of course, are within the 9th and 10th Circuits.

Petitioner's own catalogs of record, Exhibits C and D (R. 953, 954), part of a stipulation of counsel (Plf.'s Ex. 1, in evidence R. 561-563), shows that Petitioner, too, maintains branch offices or warehouses in Tulsa, Oklahoma; Oklahoma City, Oklahoma; Wichita, Kansas; and Newark, Ohio, and has a California distributor, The W. R. Guiberson

Company, of Los Angeles, California, all outside the 5th Circuit.

The Losey affidavit, attached to the petition for rehearing, on its face expresses only opinions based predominantly upon an alleged examination of one advertising medium, namely, the Composite Catalogs. It is improperly presumptive to assume that all oil field manufacturers advertise in this medium. However, it is significant to note that Losey overlooked one California manufacturer advertising gas lift equipment in said medium, namely, National Supply Company, which shows in the 1952-53 edition gas lift equipment of the plunger type, in Volume 2, pages 3686-3688, stated at page 3718 thereof to be manufactured at their Torrance, California plant. This company has advertised this equipment in this same medium throughout the five year period covered in Losey's affidavit, destroying its credibility for accuracy (See 1948 edition, pages 2863-2864; 1951 edition, pages 3596-3597, 3630). This adds to the record showing of a patent on a gas lift valve issued to National Supply Company upon application of a Pennsylvanian, Merton T. Archer (R. 1023, Vol. III, in evidence R. 394, Vol. I).

Furthermore, Losey's affidavit admits that gas lift equipment has been manufactured in both California and Oklahoma. Two gas lift patents issued to T. E. Bryan, of Oklahoma City, Oklahoma (Def.'s Exs. 115 and 116, R. 1147 and 1153, Vol. III, respectively, in evidence R. 822-823, Vol. II) are additional evidence of diversification of interest in gas lift equipment.

There is obviously no basis in the record for the assumption of counsel and the opinion of affiant, Losey, as to what relation the business of Respondent's bears to the entire gas lift business but the eight competitors admitted in the affidavit refutes any inference that Respondent monopolizes the gas lift industry.

The record, plus the judicial knowledge of the Court derived from reported decisions, involving patents on oil tools, of the Courts of Appeal from Circuits 3, 6, 8, 9 and 10, of which those listed below are exemplary, make it manifest that a patent on an oil tool, such as a gas lift device, is more likely to be litigated in different circuits than is the average patent relating to subjects other than oil tools.

Holman v. Oil Well Supply (C.A. 3, 1936), 83 F. 2d 583;
Dow Chemical Co. v. Halliburton (C.A. 6, 1943), 139 F. 2d 473;
Oil Well Improvements Co. v. Acme Foundry & Machine (C.A. 8, 1929), 31 F. 2d 898;
Patterson-Ballagh Corp. v. Moss (C.A. 9, 1953), 201 F. 2d 403;
Kobe, Inc. v. Dempsey Pump Co. (C.A. 10, 1952), 198 F. 2d 416.

It is believed that opinion affidavits would not add to the factual evidence of record and matters of which this Court may properly take judicial notice, and the limited time for response does not permit accumulation of additional detailed factual evidence to be submitted by affidavit.

Summary

It is submitted by way of summary that the question isn't to find some authority for this Court to grant certiorari for after all that rests within the sound discretion of the Court. Rather the question is what will be the nature of the review? Does the case involve some important question? Here it obviously would only be a third review of the fact issues to determine whether the evidence supports the findings of fact of the Trial Court fully concurred in by the Appellate Court, a function uniformly held by this Court

to be outside the Constitutional purpose for the Supreme Court of the land.

Denial of the petition for rehearing is respectfully requested.

Respectfully submitted,

JAMES B. SIMMS,
Attorney for Respondent,
P. O. Box 6026,
Houston 6, Texas

Of Counsel:
W. E. DYCHE,
Houston, Texas;
BROWNING, SIMMS & HYER,
Houston, Texas;
J. BYRON SAUNDERS,
Tyler, Texas

Certificate of Service

Two copies of the foregoing RESPONSE TO PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT have been served upon the Petitioner this_____day of_____, 1953, by mailing two copies to S. Austin Wier, attorney of record for Petitioner, at 523 Republic Bank Building, Dallas 1, Texas, the same being the last address of S. Austin Wier known to Respondent and Respondent's attorney, these copies being sent through United States mail, postage prepaid.

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FILED
DEC 12 1953
HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

DENY

OCTOBER TERM, 1953

No. 361

THE GUIBERSON CORPORATION,
Petitioner,

v.

GARRETT OIL TOOLS, INC.,
Respondent.

PETITIONER'S ANSWER TO RESPONDENT'S RESPONSE (DATED DECEMBER 4, 1953) TO PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

S. AUSTIN WIER,
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Dallas, Texas,
Attorney for Petitioner.

WARLICK LAW PRINTING CO. - LAW BRIEF PRINTING - DALLAS - HARWOOD 9350

In the

Supreme Court of the United States

OCTOBER TERM, 1953

No. 361

THE GUIBERSON CORPORATION,

Petitioner,

v.

GARRETT OIL TOOLS, INC.,

Respondent.

PETITIONER'S ANSWER TO RESPONDENT'S RESPONSE (DATED DECEMBER 4, 1953) TO PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioner (Defendant below) filed its petition (dated November 27, 1953) for rehearing on its original petition for Writ of Certiorari (denied November 16, 1953) in this cause; and Respondent filed its Response thereto (dated December 4, 1953), to which this instant Answer is made,

your Petitioner deeming this Answer necessary to throw light upon certain misleading assertions found in such Response which are palpable half-truths, baseless innuendos, distortions of fact and irrelevant material, all beclouding the issue of a rehearing herein.

Petitioner finds itself in duty bound to this great Court to perform the regrettable task of undertaking to dispel the miasmatic fog created by Petitioner's said "Response"; and in furtherance thereof would most respectfully show the Court that:

Respondent's combination patent in suit (Garrett, et al., No. 2,519,242), which Petitioner considers invalid because all elements and parts thereof, and their operation, are found in the prior art, is concerned with a *gas lift flow valve* used to produce oil from wells. In its petition for rehearing your Petitioner set forth facts showing that the manufacturers of gas lift flow valves are all located in the State of Texas, in one circuit (the Fifth Circuit), thereby showing the improbability of litigation involving the validity of the patent in suit in any other circuit.

Such facts bring the instant case within the doctrine of the case of *Schriber-Schroth Co. v. Cleveland Trust Company, 305 U. S. 47; 59 Sup. Ct. 8,* in which case Petition for Certiorari was granted (after being refused), the Court saying that "conflict of decision was improbable because of the concentration of the automobile industry in the Sixth Circuit."

Respondent, on page 2 of its Response, attempts to distinguish the *Schriber-Schroth* decision from the instant case

by saying that the former turned on a question of law, and that Petitioner is here seeking a review of fact questions. This is in error. The core of the matter in each case is a question of law. Petitioner again says that in the instant case neither of the Courts below applied the legal doctrine of the *Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp. 1950, 71 Sup. Ct. 127, 340 U. S. 147*, to the established facts. Failure to do so is a matter of law. Even the quotation from the Court of Appeals set forth by Respondent, on said page 2, admits as much, saying "The dispute arises on their (legal principles) application to the facts."

The nationally circulated Composite Catalog of Oil Field and Pipe Line Equipment was cited to show the concentration of the manufacture of gas lift flow valves in the Fifth Circuit.

Respondent's said "Response" declares that "supplying gas lift equipment and other oil tools is as diversified as the production of oil itself." Such statement is immaterial here. The question is not one of "supplying," but of *manufacturing*, such as was the question in the automobile industry found concentrated in the Sixth Circuit, as stated in the *Schriber-Schroth* case (supra). The patent in suit is concerned with gas lift flow valve. It is quite beside the point to talk of gas lift *equipment* and *other oil tools* (Response, p. 2).

Respondent says that its "gas lift valve has been *used* in every principal oil field of the United States as well as several foreign countries" (Res., p. 3). Again *use* is not the

point. It is manufacture. The Supreme Court apparently took a realistic view of the matter in the *Schriber-Schroth* case, recognizing that patent infringement suits are ordinarily brought against the manufacturers, and knowing that automobiles are used and sold in every Circuit in the United States, and even throughout the world.

Respondent says that both Respondent and Petitioner advertise offices in states other than Texas (Res., p. 3). This means nothing. They are sales offices. Neither concern has a manufacturing plant outside of Texas. Besides, each concern advertises other products than gas lift flow valves.

Respondent impugns the affidavit of Mr. Thomas B. Losey, which was made a part of Petitioner's Petition for Rehearing (Res., pp. 3-4). Such attack is egregious and unwarranted, being predicated upon misleading statements and half-truths which are wholly immaterial to the issue common to the instant case and the *Schriber-Schroth* case, supra. In this connection Respondent says "Losey overlooked one California manufacturer advertising *gas lift equipment* * * * National Supply Company * * *" (Res., p. 4). To support such assertion, Respondent refers to the Composite Catalogs for the years 1948, 1951 and 1952-53, citing pages in such catalogs. A reading of the pages so cited, shows clearly that not on any one of them can there be found any reference whatsoever to a gas lift flow valve.

Gas lift *equipment* is not the same as a gas lift flow valve. "Gas lift equipment" is a very broad term which covers literally hundreds of devices, tools and parts.

The National Supply Company's advertisements in the Composite Catalogs, referred to by Respondent, are headed "Ideal Plunger Lift," and this heading is followed by a sub-head which reads: "The Ultimate in Long-Stroke Pumping." The text by which National Supply Company describes this equipment in the 1948 Composite Catalog refers to it as "* * * utilizing the tubing for its entire length as a cylinder, and utilizing the plunger as a piston which travels the full length of the tubing at each stroke." In short, the device described by National is a plunger for pumping oil *without* a gas lift flow valve.

The Composite Catalogs for 1951 and for 1952-53 describe the same type of pumping equipment of National Supply Company. Nowhere is there any mention or showing of a gas lift flow valve.

Respondent says that there was "a patent on a gas lift valve issued to National Supply Company upon application of a Pennsylvanian, Merton T. Archer." *A Pennsylvanian!* No showing is made that either the Pennsylvanian or the National Supply Company is making a gas lift flow valve or has ever made one. The Archer patent was issued in 1928 and has long since expired. (Rec., pp. 1021-27).

Far from showing that Mr. Losey's affidavit is not credible or accurate, the care with which he listed *only* the manufacturers of *gas lift flow valves*, eliminating any and all misleading material having to do with various irrelevant equipment, bespeaks its truth.

Respondent says that Losey's affidavit "admits" that gas lift equipment *has been* manufactured in both Califor-

nia and Oklahoma. This further shows the care with which such affidavit presented the facts. The manufacturer in California disappeared from the scene in 1939 after only two years of effort. The Oklahoma manufacturer never offered a valve after 1941. (Petitioner's Petition for Rehearing, p. 10). This simply shows clearer than ever that manufacturers attempting to make a gas lift flow valve in those two states ceased such struggle more than a dozen years ago. The critical period of this inquiry follows the date on which the patent in suit was issued, to-wit, August 15, 1950. This is the only period of time in which there could have been litigation concerning the validity of such patent, with or without conflict of decision between circuits.

Petitioner says that "Two gas lift patents issued to T. E. Bryan, of Oklahoma City, Oklahoma," and therefore concludes that such is "additional evidence of diversification of interest in gas lift equipment." (There is a like "diversification of interest" among inventors of automobile parts, living, as they do, in all circuits of the United States.)

If the stated place (Oklahoma City) were in fact the residence of T. E. Bryan, it would have no bearing upon the concentration of the manufacture of gas lift flow valves in the Fifth Circuit, which fact is a stubborn fact wholly irrefutable by anybody. It is sad to have to say that T. E. Bryan has lived for many years, beginning long prior to the publication of the patent in suit, in Tarrant County, Texas, within the vicinity of Fort Worth; and Respondent and Respondent's Counsel know that this is true, and have long known it, prior to the contrary insinuation appearing

on page 4 of their "Response." One counsel of record for Respondent in this cause, Ralph R. Browning, solicited these Bryan patents in the Patent Office and signed the Patent Office drawings.

For more than a year heretofore the same Mr. Bryan and the Respondent herein have been locked in a lawsuit in the United States District Court for the Eastern District of Texas (from which the instant case arose), each asserting in their pleadings that the other party litigant is infringing a patent for a gas lift flow valve. Also during the time the instant case has been in the Courts, the Respondent initiated a suit against the same Mr. Bryan in the United States District Court in Fort Worth, Texas, involving a gas lift flow valve patent.

Reference must be made to Respondent's assertions, on page 5 of its said "Response," wherein it asks the Court to consider five reported cases "involving patents on oil tools." There are thousands of oil tools made; and they have nothing to do with the instant case. Here we are only concerned with the *concentration of the manufacture of gas lift flow valves.*

The five reported cases of patent litigation, which Respondent would have the Court believe have something to do with the question of the concentration of the manufacture of gas lift flow valves in the Fifth Circuit, are not concerned in any way with such a valve. The several patents litigated in the five cases listed are altogether differ-

ent from and foreign to gas lift flow valves. They concern, in the order listed,

(1) *Spudding shoes* used in drilling wells,

(2) *Acid treatment* of earth formations,

(3) *Casing head* for oil wells,

(4) *Wire line guide* used in drilling wells,

(5) *Hydraulic pumps.*

It is respectfully submitted that the "Response" of Respondent herein in nowise negatives any fact set forth in The Petition for Rehearing herein. Rather by the sheer starkness of the paucity of the assertions and arguments and irrelevancy in such "Response" is the solid truth of Petitioner's position shown to be founded on unanswerable fact and made more strong.

"Truth crushed to earth," says the poet, "shall rise again." May it be so here.

WHEREFORE, your Petitioner, The Guiberson Corporation, prays this Honorable Court to grant its Petition for Rehearing, and that the Court's most gracious Writ of Certiorari be granted in this cause.

Respectfully submitted,

S. AUSTIN WIER,
523 Republic Bank Building,
Dallas, Texas,
Attorney for Petitioner.

Dated: December 11, 1953.

CERTIFICATE OF COUNSEL

STATE OF TEXAS }
COUNTY OF DALLAS }

S. AUSTIN WIER, being first duly sworn, on oath certifies and says: That he is attorney of record for Peitioner in the above cause; that in his judgment the within and foregoing Answer to Respondent's Response to Petition for Rehearing is well founded; and that it is not interposed for delay, but in order that justice may be done.

S. Austin Wier

Sworn and subscribed to before me at Dallas, Texas, this 11th day of December, A. D. 1953.

Howard E. Moore

Notary Public in and for County and State Aforesaid.

CERTIFICATE OF SERVICE

Two copies of the foregoing Answer have been served on Respondent's Counsel by first class mail, postage prepaid, addressed to Browning and Simms at 3303 Montrose Boulevard, Houston 6, Texas, on this 11th day of December, 1953.

S. Austin Wier

Counsel for Petitioner.